Lau Kieng Kong & Ors v Minister for Resource Planning & Anor

HIGH COURT (MIRI) — ORIGINATING MOTION NO MR10 OF 1985
JOHN CHONG J
20 FEBRUARY 1994

Land Law *— Acquisition of land — Delay in making declaration of acquisition — Whether s 48 declaration required by law to be made after s 47 notice — Land Code (Sarawak Cap 81) ss 47 & 48*

Land Law *— Acquisition of land — Delay in making award — 3½-year delay — Whether unreasonable — Increase of 18% in land value causing pecuniary loss to owners — Whether serious injustice — Whether court could intervene by granting certiorari — Land Code (Sarawak Cap 81) ss 47 & 48*

The applicants were the registered co-proprietors of a piece of land in Bintulu ('the said land'). On 16 January 1973, a notice was published in the *Sarawak Government Gazette* under s 47 of the Land Code (Sarawak Cap 81) ('the Code') that certain areas, including the said land, were needed for the development of Bintulu town. On 25 March 1982, a declaration was published under s 48 of the Code that the said land was required for residential accommodation for public servants. Pursuant to s 51 of the Code, the Superintendent of Lands and Surveys, Fourth Division ('the Superintendent') held an inquiry into compensation on 16 July 1985 and made an award of compensation for the said land in the sum of RM70,864.

The applicants' valuers had valued the said land at RM1.06m as at 16 July 1985 and they applied for an order of certiorari to quash the award on the grounds that: (i) the delay of nine years between the s 47 notice and the s 48 declaration and a further delay of 3½ years from the s 48 declaration and the award was grossly unreasonable and tantamount to an abuse of power rendering all the proceedings null and void; and (ii) the delay had resulted in an inadequate compensation to the applicants and brought the enquiry and award outside the scope of the Code, was not in accordance with the Code, and contrary to art 13(1) of the Federal Constitution.

Held, dismissing the application:

(1) Section 47 does not operate as an act of acquisition as the Government may yet decide not to proceed with the acquisition. Furthermore, the s 48 declaration is not required to be made after the s 47 notice. Therefore, the question of delay between the s 48 declaration and s 47 notice did not arise.

(2) The award under s 51 must be made within a reasonable time or as soon as possible after the s 48 declaration. The Superintendent was bound to finalize the inquiry into compensation without

undue delay. In the circumstances, the delay of 3½ years in making the award was unreasonable. A

(3) However, whether the delay was not in accordance with the Code and contrary to art 13(1) of the Federal Constitution depended on whether there was such an increase in the land value between the date of the s 48 declaration and the inquiry to infer an injustice to the applicants. In this case, the increase of 18% was not substantial enough to infer that serious injustice had been caused to the applicants and their pecuniary loss was not in itself sufficient to justify intervention by the court. B

[Bahasa Malaysia summary C

Pemohon merupakan tuan punya bersama sebidang tanah di Bintulu ('tanah tersebut'). Pada 16 Januari 1973, suatu notis telah diumumkan di dalam *Sarawak Government Gazette* di bawah s 47 Kanun Tanah (Sarawak Bab 81) ('Kanun itu') bahawa beberapa kawasan tertentu, termasuk tanah tersebut, diperlukan untuk pembangunan bandar Bintulu. Pada 25 Mac 1982, suatu pengisytiharan telah diumumkan di bawah s 48 Kanun itu bahawa tanah tersebut diperlukan untuk membina rumah kediaman bagi kakitangan awam. Mengikut s 51 Kanun itu, Penguasa Tanah dan Kajian, Bahagian Keempat ('Penguasa itu') telah mengadakan suatu siasatan mengenai pampasan pada 16 Julai 1985 dan membuat suatu award pampasan bagi tanah tersebut dalam jumlah RM70,864. D E

Penilai pemohon telah menetapkan nilai tanah tersebut pada jumlah RM1.06 juta setakat 16 Julai 1985 dan mereka telah memohon untuk suatu perintah certiorari untuk membatalkan award itu atas alasan bahawa: (i) kelengahan selama sembilan tahun di antara notis di bawah s 47 dan pengisytiharan di bawah s 48 itu dan kelengahan selanjutnya selama 3½ tahun dari pengisytiharan di bawah s 48 dan award itu adalah sangat tidak munasabah dan merupakan suatu penyalahgunaan kuasa yang menjadikan semua prosiding terbatal dan tidak sah; dan (ii) kelengahan itu telah mengakibatkan pampasan yang tidak mencukupi di bayar kepada pemohon dan membawa siasatan dan award itu keluar daripada skop Kanun itu, adalah tidak menurut Kanun itu, dan bertentangan dengan perkara 13(1) Perlembagaan Persekutuan. F G

Diputuskan, menolak permohonan itu: H

(1) Seksyen 47 tidak beroperasi sebagai suatu tindakan pengambilan kerana Kerajaan masih boleh membuat keputusan supaya tidak meneruskan pengambilan itu. Lagipun, pengisytiharan di bawah s 48 tidak perlu dibuat selepas notis di bawah s 47 itu diumumkan. Oleh itu, soalan kelengahan di antara pengisytiharan di bawah s 48 dan notis di bawah s 47 tidak timbul. I

(2) Award di bawah s 51 mesti dibuat dalam tempoh yang munasabah atau secepat mungkin selepas pengisytiharan di bawah s 48.

A Penguasa diwajibkan untuk menyelesaikan siasatan mengenai pampasan tanpa kelengahan yang tidak wajar. Di dalam keadaan di sini, kelengahan selama 3½ tahun dalam membuat award itu adalah tidak munasabah.

(3) Bagaimanapun, sama ada kelengahan itu tidak menurut Kanun
B itu dan bertentangan dengan perkara 13(1) Perlembagaan Persekutuan bergantung kepada sama ada terdapat suatu kenaikan dalam nilai tanah tersebut di antara tarikh pengisytiharan di bawah s 48 dan siasatan itu sehingga inferens boleh dibuat bahawa suatu ketidakadilan diakibatkan kepada pemohon. Di dalam kes ini, kenaikan sebanyak 18% tidak cukup banyak untuk
C membuat inferens bahawa ketidakadilan telah diakibatkan kepada pemohon dan kerugian kewangan mereka itu dengan sendirinya tidak mencukupi untuk menjustifikasikan campur tangan oleh mahkamah.]

D **Notes**

For cases on delay in land acquisition, see 8 *Mallal's Digest* (4th Ed) paras 927–932.

For cases on applications for certiorari, see 8 *Mallal's Digest* (4th Ed) paras 886–887.

E **Cases referred to**

Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik & Ors [1983] 2 MLJ 390 (folld)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35 (folld)

F *Pemungut Hasil Tanah, Kuantan v Oriental Rubber & Palmoil Sdn Bhd* [1986] 1 MLJ 39 (folld)

Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor [1980] 1 MLJ 58 (folld)

G **Legislation referred to**

Federal Constitution art 13
Interpretation Ordinance (Sarawak Cap 1) s 3(14)
Land Code (Sarawak Cap 81) ss 47, 48, 49, 51
Rules of the High Court 1980 O 53 r 1(2)

H *Goh Choo Kee* (*Abdul Rahman, Chan, Jugah, Wan Ullok & Co*) for the applicants.

David Sio (Legal Officer, State Attorney-General's Chambers) for the respondents.

I *Cur Adv Vult*

John Chong J: The applicants were at material times the registered co-proprietors of all that parcel of land ('the said land') situate at Sungai Trus, Sibiau, Bintulu, containing an area of 2.869 hectares (7.09 acres)

and described as Lot 136 Kemena Land District. On 16 January 1973, the Government of the State of Sarawak ('the Government') caused to be published in the *Sarawak Government Gazette* a notice (GN No 274) under s 47 ('the s 47 notice') of the Land Code (Sarawak Cap 81) ('the Land Code') to the effect that all the areas of land specified in the schedule thereto (including the said land), were likely to be needed for the development of Bintulu town. On 25 March 1982, the Government published in the *Sarawak Government Gazette* a declaration (GN No 1101) under s 48 of the Land Code ('the s 48 declaration') to the effect that the said land was required for the provision of a site for residential accommodation for public servants. Pursuant to s 51 of the Land Code, the Superintendent of Lands and Surveys, Fourth Division ('the Superintendent') held an inquiry into compensation on 16 July 1985 and, on 11 September 1985, made an award of compensation for the said land under Award No 2/1985 in the sum of RM70,864. The applicants were dissatisfied with the award. They said the award worked out to be just under RM10,000 per acre whereas their valuers valued the said land at RM1.06m at the date of the inquiry on 16 July 1985. Pursuant to leave of the court given on 21 January 1986, the applicants applied by originating motion dated 27 January 1985 for an order of certiorari to remove into this court for the purpose of its being quashed, the award made by the second respondent under s 51 of the Land Code on 11 September 1985 in respect of the said land.

At the hearing, the applicants relied on two of the grounds stated in the statement filed pursuant to O 53 r 1(2) of the Rules of the High Court 1980 in support of the declaration. They are as follows:

(1) A delay of more than nine years between the s 47 notice and the s 48 declaration and/or a further delay of about 3½ years from the date of the s 48 declaration and the award made under s 51 of the Land Code was long, inordinate and grossly unreasonable and tantamount to an abuse of power rendering the s 47 notice and the s 48 declaration, the subsequent inquiry and award made under s 51 and all subsequent proceedings null and void.

(2) The long, inordinate and grossly unreasonable delay aforesaid, resulting in an inadequate compensation to the applicants, brings the enquiry and award under s 51 of the Land Code outside the purview and scope of the Land Code, [was] not in accordance with the Land Code, and contrary to the law and/or cl (1) of art 13 of the Federal Constitution.

With regard to the first ground, there appears to be three distinct complaints of delay. The first is the delay in making the s 48 declaration nine years after the s 47 notice. The second is the delay in making the award 12½ years after the s 47 notice. The third is the delay in making the award 3½ years after the s 48 declaration. The relevant statutory provisions are to be found in ss 47, 48, 49 and 51 of the Land Code. So far as material, they read as follows:

A 47(1) Whenever the Minister decides that land in any locality is likely to be needed for any of the purposes specified in s 46, the Superintendent shall cause a public notice of the substance of such decision to be given at convenient places in such locality, and thereupon any officer or other person either generally or specially authorized by the Minister in this behalf and his servants and workmen may enter upon such land and may survey, bore, take levels, set out and mark boundaries, and do all other acts necessary to ascertain whether the land is suitable for such purpose.

(2) As soon as conveniently may be after such entry, the Superintendent shall assess the compensation for damage resulting therefrom.

(3) Such compensation shall not become payable so far as it relates to any land which is resumed under s 48 and, if paid, shall be refunded to the Government on demand by the Superintendent.

...

48(1) Whenever it appears to the Minister that any particular land is needed for any of the purposes specified in s 48, the Minister shall make a declaration to that effect.

(2) The declaration shall be posted in the office of the Superintendent and of the District Officer and shall state the situation of the land, the particular purpose for which it is needed, its approximate area and all other particulars necessary for identifying it and also the place where a plan of the land, if any has been made, may be inspected. Such declaration shall be conclusive evidence that the land is needed for the purpose specified therein.

(3) Upon the posting of such declaration an entry thereof shall be made in the Register in respect of the land affected.

49(1) The Superintendent shall thereupon cause a plan of the land to be made, if none already exists, and shall cause notices to be posted at convenient places on or near the land to be taken stating that the Government intends to take possession thereof and that claims to compensation for all interests therein may be made to him.

(2) Every such notice shall state the particulars of the land and shall require all persons interested therein to appear personally or by agent before the Superintendent at a time and place in such notice mentioned, such time not being earlier then twenty-one days after the date of posting of the notice, and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests and their objections, if any, to the measurements as surveyed ...

51(1) On the day so fixed, or on any other day to which the inquiry has been adjourned, the Superintendent shall proceed to inquire into the objections, if any, which any person interested has stated, pursuant to a notice given under s 43, to the measurements as surveyed, and into the value of the land, and into the respective interests of the persons claiming the compensation, and shall make an award under his hand of —

...

(b) the compensation which in his opinion should be allowed for the said land in accordance with the directions contained in sections 60 and 61 ...

I shall deal first with the first two complaints of delay in respect of the making of the s 48 declaration and the award after the s 47 notice. On a plain reading of the above-quoted provisions, I am not inclined to the proposition suggested by learned counsel for the applicants that s 47 forms part and parcel of the acquisition process. In my view, s 47 stands entirely on its own, unconnected with any of the other three sections. It merely provides for power to enter and survey the land for the purpose of determining its suitability for the purposes stated in the notice, and apart from the assessment of compensation for damage resulting from such entry, it prescribes no further acts to be done towards acquisition. Section 47 does not therefore operate as an act of acquisition, for despite such notification the Government may yet decide not to proceed with the acquisition. It follows that the making of the s 48 declaration is not an act that is either expressly or impliedly required by law to be done after the s 47 notice. Moreover, it is also clear that the various steps required to be taken under s 49 towards finalization of the inquiry under s 51 do not follow from the s 47 notice but from the s 48 declaration. That this is so is sufficiently indicated in s 49(1) by the presence of the word 'thereupon' which, in my view, refers to the publication of the s 48 declaration and not the publication of the s 47 notice. In *Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor* [1980] 1 MLJ 58, where four successive s 48 declarations were made, at intervals between three to five years, after the s 47 notice, the Federal Court was unanimous in its opinion that the s 48 declarations were all valid because ss 47 and 48 were not 'intimately connected' and the doctrine of exhaustion did not apply in order to invalidate them. Since s 47 is unrelated to s 48 and does not form part and parcel of the acquisition process, the question of delay does not arise. It follows that in this context delay is not a valid ground for vitiating the acquisition process. Accordingly, the delay complained of by the applicants in respect of the making of the s 48 declaration and the award after the s 47 notice is irrelevant and misconceived.

I now come to the third complaint contained in the first ground, ie the delay between the s 48 declaration and the making of the award. Under the Land Code the power to acquire land is exercised through a declaration of acquisition under s 48. Once that declaration is issued, the Superintendent is legally bound to do all the acts and things required to be done under s 49 towards finalization of the inquiry into compensation under s 51. Although no time is prescribed within which the inquiry must be held, there can be no doubt that the proceedings are to follow without undue delay upon the publication of the s 48 declaration and, indeed, s 3(14) of the Interpretation Ordinance (Sarawak Cap 1) which reads: 'A prescribed act or thing shall, if no time is prescribed, be done with all convenient speed and as often as the prescribed occasion arises', requires that it must be done with 'all convenient speed', which expression has been judicially defined in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35 as meaning 'as soon as possible' or 'within a reasonable time'. Applying this construction, what it boils down to is that the making of the award under s 51 must be done

A within a reasonable time or as soon as possible after the s 48 declaration. In the present case it is not in dispute that the s 48 declaration was published on 5 March 1982 and that the award was made on 11 September 1986. Therefore, there was a delay of 3½ years between the s 48 declaration and the making of the award. The question that arises for determination is
B whether the delay of 3½ years could be considered as reasonable in the circumstances of this case. For an answer to this question, I shall turn to the affidavit of Sudarsono Osman, the Superintendent of Lands and Surveys, Fourth Division, affirmed on 19 September 1986. The material part reads as follows:

C (7) That a survey job No 100/82 was issued, inter alia, for the verification of boundaries of the land to be acquired, on 1 March 1982, a copy of which is attached hereto marked 'C'.

(8) That a valuation report was prepared and submitted up the Lands and Surveys Headquarters in Kuching for approval on 1 September 1982 and the said approval was duly given on 8 September 1982, a copy of
D each is attached hereto marked 'D' and 'E'.

(9) That before the completion of the survey report, a warrant for the sum of RM174,000 (together with compensation for another piece of land) was received. As the survey job could not be completed at the end of the year, the warrant could not be spent before the end of the year. I accordingly advised that the warrant be withdrawn.

E (10) That on 5 January 1983, the survey job was completed and a request for fund was made which I was advised that fund for the said acquisition could not be reallocated for 1983.

(11) That on 5 March 1985, a warrant was received for the acquisition of the said land.

F From the above affidavit evidence it is clear that the reason why the award could not be made sooner was that the fund for the acquisition of the said land was not on hand. In my view, the unavailability of funds is no excuse for withholding the holding of the inquiry and the making of the award in this case. The provisions of the Land Code relating to the acquistion
G process are clear. After the s 48 declaration was published, the Superintendent was bound by law to perform, without undue delay, all the acts and things under s 49 towards finalization of the inquiry into compensation under s 51. Whether or not the fund for the acquisition was then available is immaterial, for it is not a condition precedent to the holding of the inquiry and the making of the award. In the present case the
H Superintendent should have proceeded without undue delay after the 'survey job' was completed in January 1983 and should not have deferred the holding of the inquiry and the making of the award until after receipt of the warrant for the acquisition of the said land on 5 March 1985. In the circumstances I must say that the delay of 3½ years on the part of the
I Superintendent in making the award was unreasonable.

This brings me to the second ground, ie the long, inordinate and grossly unreasonable delay aforesaid, resulting in an inadequate compensation to the applicants, brings the enquiry and award under s 51

of the Land Code outside the purview and scope of the Land Code, not in accordance with the Land Code, and contrary to the law and/or cl (1) of art 13 of the Federal Constitution.

In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35, the Federal Court held, inter alia, that long and unexplained delay between the declaration of acquisition and finalization of the inquiry into compensation, resulting in injustice to the landowner, is tantamount to an abuse of power which renders the inquiry and all subsequent proceedings null and void. This view was reaffirmed by the same court in *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik & Ors* [1983] 2 MLJ 390. It was restated by the Supreme Court in *Pemungut Hasil Tanah, Kuantan v Oriental Rubber & Palmoil Sdn Bhd* [1986] 1 MLJ 39 at p 40 in these terms:

> Unreasonable long delay in holding an inquiry and in making an award can, in certain circumstances, cause grave or serious injustice to the landowner when land value and prices as well as costs are rising rapidly resulting in an award based on out of date prices or value which may not truly reflect adequate compensation. In others, such unexplained and unreasonable delay may amount to an abuse of statutory power. In such cases, the court may, in a proper case, declare that the public authority should be held to be disabled from going on with the compulsory acquisition of the land.

And at p 41, it added:

> [B]efore any judge could infer that unreasonable delay had seriously prejudiced or even resulted in serious injustice to the landowner whose land had been compulsorily acquired by the Authority, there must be admissible evidence to support it and there must also be satisfactory evidence that land value and/or prices had risen rapidly between the date of the publication of the declaration in the Gazette and the date of the inquiry.

In the light of these authorities, it seems to me that the second ground may be conveniently disposed of by a consideration of whether there is any evidence to show that there had been such increase in the land value or prices between the date of the s 48 declaration and the date of the inquiry as to entitle the court to infer that serious injustice has been caused to the applicants by the delay, so as to warrant intervention by the court.

According to the valuation report exhibited as 'MMK1' to the affidavit of Henry Yeo affirmed on 30 June 1986, the market value of the said land was RM127,000 per acre at the date of the publication of the s 48 declaration on 25 March 1982 and that from 1983 to the date of the inquiry on 15 July 1986 it was RM150,000 per acre. This merely shows an increase of 18% which, in my view, is not substantial enough to give rise to the inference that serious injustice has been caused to the applicants by the delay. In arriving at this conclusion, I am not unmindful that in the present case substantial pecuniary loss has been caused to the applicants by the 'delay' in the making of the s 48 declaration. But this in my view is not in itself sufficient to justify intervention by the court because, as has been said, the making of the s 48 declaration is not a prescribed act that is required either expressly or impliedly by law to be done after the s 47

notice. In this connection, I can only echo the sentiments expressed by Lee Hun Hoe CJ (Borneo) (as he then was) in *Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor* [1980] 1 MLJ 58 where his Lordship said at p 61:

> I take the view that under the Sarawak legislation it is possible for more declarations than one under s 48 to be made in respect of land comprised in a notification under s 47. I am aware where compensation has to be determined with reference to the material date under s 47 any delay in making a declaration under s 48 is bound to cause the person whose land is to be acquired to suffer pecuniary loss if land prices have arisen between the period of notification under s 47 and declaration under s 48. The delay would be longer if successive declarations under s 48 could be made in respect of land comprised in the notification under s 47. It could also work in the reverse if the land prices tumble down. I hope the government would try to minimize the delay in making the declaration or declarations. One way of preventing long delay would be to fix a time whereby notifications under s 47 would automatically lapse. Another way is to withdraw resumption under s 79 as soon as the land is no more required for public purpose. In my view as long as the publication of the notifications under s 47 exists there is nothing to prevent the making of more declarations than one under s 48 involving the acquisition of a large area as in this case.

Accordingly and for the reasons above stated, I would dismiss the application with costs.

Application dismissed.

Reported by Anne Khoo